IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MRS. JUSTICE K.HEMA

FRIDAY, THE 30TH NOVEMBER 2007 / 9TH AGRAHAYANA 1929

MFA.No. 1312 of 2001()

OS.21/1996 of II ADDL.DISTRICT COURT,ERNAKULAM
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APPELLANT/PLAINTIFF (PETITIONER) IN THE LOWER COURT:

K.J.JOSEPH,AGED 46, S/O.LATE JOSEPH, RESIDING AT KOTTAPARAMBIL, NEAR THOPPIL JUNCTION, THRIKKAKKARA, B.M.C. P.O.

BY ADV. SRI.VARGHESE C.KURIAKOSE

RESPONDENTS/DEFENDANTS (RESPONDENTS) IN THE LOWER COURT:

1.SETH JOSEPH,AGED ABOUT 54, H/O.VICTORIA, TEACHER, PALLIVEETTIL HOUSE, NEAR MANJUMMEL CHURCH, NOW RESIDING AT THEKKEMURIYIL (C/O ABOOBACKER), EDAPPALLY NORTH NEAR KUNNUMPURAM, COCHIN-24.

2.YACOB JOSEPH,ABOUT 49, RESIDING AT POZHAMANGALAM HOUSE, NEAR N.G.O.QUARTERS,B.M.C.P.O., THRIKKAKKARA.

3.RACHEL SEBASTIAN,AGED ABOUT 44, W/O.SEBASTIAN,RESIDING AT MADAKKAL HOUSE, NEAR N.G.O. QUARTERS, B.M.C.P.O., THRIKKAKKARA.

4.SARAMMA XAVIER,AGED ABOUT 42, W/O.XAVIER OF ARAKKATHAZATH HOUSE, NOW RESIDING AT KANDOTH HOUSE, (C/O.THOMAS) AROOR P.O., NEAR AROOR CHURCH, ALLEPPEY DISTRICT.

BY ADV. SRI.K.C.CHARLES FOR R2
SRI.C.MURALI FOR R1, R3 AND R4

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD ON 30/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY & K.HEMA, JJ.

M.F.A.NO.1312 OF 2001 ()

Dated this the 30th day of November, 2007

J U D G M E N T

KOSHY,J.

Appellant herein was the plaintiff in O.S.No.21/1996 which was filed as L.A.O.P.No.333/1995. When objections were filed, it was converted as a suit. According to the appellant, he was looking after the affairs of Mary, his mother and mother gave the property in his favour by executing Ext.P1 will. At the time of execution of the will she was healthy and had full testamenting capacity. Will was attested by the 1st respondent son and 4th respondent daughter of the testator. It is a registered will executed five years before the death of the testator. It is submitted that Registrar will not accept the will unless he is personally satisfied that the legal formalities are complied with. But mere registration of the will is not enough to prove the will because of the provisions contained under Section 63 of the Indian Succession Act as well as Section 68 of

the Indian Evidence Act. The contention of the contesting respondents was that a mortgage deed was also registered on the same day and misrepresenting that it is the mortgage deed, some documents were executed. In other wards, signature of the respondents in Ext.P1 document are not denied. Presence of the testator in the office of the Registrar and signature of the testator in the document produced are also admitted. But according to them, it was signed by Mary without knowing that it was a will and mandatory requirements of proving the will by examining the attesting witnesses etc. were not carried on. It is true that as application was filed to summon the witnesses but it was not pursued. But attestors are defendants. They could have examined themselves if there was any infirmity in the will. Allegations of fraud etc. are to be proved by the persons alleging it. Yet for proving due execution of the will, statutory requirements have to be complied with and primary burden is on the plaintiff (profounder of the will). If that burden is discharged, it is for the contesting respondents to plead and prove that will is not valid for vitiating circumstances like fraud, coercion etc. Even if the attesting witnesses have denied the due execution of the

will, it is for the court to find out from overall evidence and circumstances whether there was proper attestation and due execution of the will as held in ***George v. Varkey (2004 (1) KLT 21).*** In otherwords, from the overall circumstances and totality of evidence adduced in the case, it is for the court to come to the conclusion whether attesting witnesses signed or not and whether there was due execution of the will or not.

2. Here a petition was filed for summoning the witnesses and it can be theoretically stated that respondents were called. They were called for adducing evidence but there is no evidence to the effect that will was executed and signed in the presence of witnesses. PW2, the scribe deposed that mother and the attesting witnesses signed in his presence. But it was not disposed that testator signed the will in the presence of the witnesses and vice versa. There is a lacuna in proving the strict formalities provided under Section 63 of the Indian Succession Act. A Division Bench of this Court in ***Jortin Antony v. S.P.D. Marthana Varma (2000 (2) KLT 680)*** held that a party to the suit does not have a right to summon the opposite party to give evidence. It is really left to the

Court possibly after the evidence of all the witnesses made available is completed to consider whether it is necessary to examine one of the parties and compel that party to give evidence. If they refuse to come, court can take an adverse inference. The above judgment was rendered for the Division Bench by Justice Mr.P.K.Balasubramanyan, as his lordship then was. According to the appellant, since the contesting witnesses were also parties and they have denied the due attestation of the will, they could have adduced evidence, as they have admitted their signature in the will though believing it to be a mortgage deed. In such circumstance, burden is normally shifted to them as it is settled law that burden is on the party who assert the invalidity of the document due to fraud or coercion. In any event, they were not examined. In the circumstances of the case, we are of the view that it is a fit case where court should have summoned the attesting witnesses and we are not expressing any opinion regarding the merits of the matter. We give both parties an opportunity to adduce further evidence and the case is remanded to the trial court and we direct the court to dispose of the case as expeditiously as possible. Parties are directed to appear before

the court on 31.1.2008. With the above directions this appeal is remanded.

J.B.KOSHY, JUDGE

K.HEMA, JUDGE

prp

J.B.KOSHY & K.HEMA, JJ.

M.F.A.NO.1312 OF 2001 ()

J U D G M E N T

30th November, 2007